



D. Public-Private Partnerships in California

Through its enabling legislation¹⁰, the Authority has considerable powers to enter into a variety of contracting mechanisms, including public-private partnerships, for the development of high-speed rail in California. The following information is included to provide some context for the general environment in California related to the use of public-private partnerships.

¹⁰ See Exhibit A.2.



D.1. Infrastructure Finance Act

GOVERNMENT CODE, SECTION 5956-5956.10

5956. Local governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If local governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector investment capital utilized to design, construct, maintain, rebuild, repair, and operate infrastructure facilities. Unless private sector investment capital becomes available to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, some local governmental agencies will be unable to replace deteriorating infrastructure. Further, some local governmental agencies will be unable to expand and build new infrastructure facilities to serve the increasing population.

5956.1. It is the intent of the Legislature that local governmental agencies have the authority and flexibility to utilize private investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities. Without the ability to utilize private sector investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, the Legislature finds that some local governmental agencies will not be able to adequately, competently, or satisfactorily retrofit, reconstruct, repair, or replace existing infrastructure and will not be able to adequately, competently, or satisfactorily design and construct new infrastructure.

5956.2. It is the intent of the Legislature that this chapter be construed as creating a new and independent authority for local governmental agencies to utilize private sector investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities. To that end, this authority is intended to supplement and be independent of any existing authority and does not limit, replace, or detract from existing authority. This chapter may be used by local governmental entities when they deem it appropriate in the exercise of their discretion. It is the intent of the Legislature that this act create no new governmental entities.

5956.3. (a) For purposes of this chapter, "governmental agency" includes a city, county, city and county, including a chartered city or county, school district, community college district, public district, county board of education, joint powers authority, transportation commission or authority, or any other public or municipal corporation.

(b) For purposes of this chapter, "private entity" includes a person, business entity, combination of persons and business entities, or a combination of business entities.

(c) For purposes of this chapter, "fee-producing infrastructure project" or "fee-producing infrastructure facility" means the operation of the infrastructure project or facility will be paid for by the persons or entities benefited by or utilizing the project or facility.



5956.4. A governmental agency may solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and may lease to, private entities for the following types of fee-producing infrastructure projects:

- (a) Irrigation.
- (b) Drainage.
- (c) Energy or power production.
- (d) Water supply, treatment, and distribution.
- (e) Flood control.
- (f) Inland waterways.
- (g) Harbors.
- (h) Municipal improvements.
- (i) Commuter and light rail.
- (j) Highways or bridges.
- (k) Tunnels.
- (l) Airports and runways.
- (m) Purification of water.
- (n) Sewage treatment, disposal, and water recycling.
- (o) Refuse disposal.
- (p) Structures or buildings, except structures or buildings that are to be utilized primarily for sporting or entertainment events.

5956.5. Notwithstanding Chapter 10 (commencing with Section 4525) of Division 5, or Part 2 (commencing with Section 10100) or Part 3 (commencing with Section 20100) of Division 2 of the Public Contract Code, the governmental agency soliciting proposals and entering into agreements with private entities for the studying, planning, design, developing, financing, construction, maintenance, rebuilding, improvement, repair, or operation, or any combination thereof, by private entities for fee-producing infrastructure projects shall ensure that the contractor is selected pursuant to a competitive negotiation process. Projects may be proposed by the private entity and selected by the governmental agency at the discretion of the governmental agency. Projects may be proposed and selected individually or as part of a related or larger project. The competitive negotiation process shall utilize, as the primary selection criteria, the demonstrated competence and qualifications for the studying, planning, design, developing, financing, construction, maintenance, rebuilding, improvement, repair, or operation, or any combination thereof, of the facility. The selection criteria shall also ensure that the facility be operated at fair and reasonable prices to the user of the infrastructure facility services. The competitive negotiation process shall not require competitive bidding. The competitive negotiation process shall specifically prohibit practices that may result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit governmental agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract under this section that would subject those employees to the prohibition of Section 87100. Other than these criteria and applicable provisions related to providing security for the construction and completion of the facility, the governmental agency soliciting proposals is not subject to any other provisions of the Public Contract Code or this code that relates to public procurements.



5956.6. (a) For purposes of facilitating projects, the agreements specified in Section 5956.4 may include provisions for the lease of rights-of-way in, and airspace over, property owned by a governmental agency, for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the private entity to construct infrastructure facilities supplemental to existing government-owned facilities. Infrastructure constructed by a private entity pursuant to this chapter shall, at all times, be owned by a governmental agency, unless the governmental agency, in its discretion, elects to provide for ownership of the facility by the private entity during the term of the agreement. The agreement shall provide for the lease of those facilities to, or ownership by, the private entity for up to 35 years. In consideration therefor, the agreement shall provide for complete reversion of the privately constructed facility to the governmental agency at the expiration of the lease at no charge to the governmental agency. Subsequent to the expiration of the lease or ownership period, the governmental agency may continue to charge fees for use of the infrastructure facility. If, after the expiration of the lease or ownership period, the governmental agency continues to lease airspace rights to the private entity, it shall do so at fair market value.

(b) The agreement between the governmental agency and the private entity shall include, but need not be limited to, provisions to ensure the following:

(1) Compliance with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code). Neither the act of selecting a proposed project or a private entity, nor the execution of an agreement with a private entity, shall require prior compliance with the act. However, appropriate compliance with the act shall thereafter occur before project development commences.

(2) Security for the construction of the facility to ensure its completion, and contractual provisions that are necessary to protect the revenue streams of the project.

(3) Adequate financial resources of the private entity to design, build, and operate the facility, after the date of the agreement.

(4) Authority for the governmental agency to impose user fees for use of the facility in an amount sufficient to protect the revenue streams necessary for projects or facilities undertaken pursuant to this chapter. User fee revenues shall be dedicated exclusively to payment of the private entity's direct and indirect capital outlay costs for the project, direct and indirect costs associated with operations, direct and indirect user fee collection costs, direct and indirect costs of administration of the facility, reimbursement for the direct and indirect costs of maintenance, and a negotiated reasonable return on investment to the private entity.

(5) As a precondition to the imposition or increase of a user fee, the governmental agency shall conduct at least one public hearing at which public testimony will be received regarding a proposed user fee revenue or increase in user fee revenues. The public hearing shall precede the action by the governmental agency to actually impose a user fee or to increase an existing user fee. The governmental agency shall consider the public testimony prior to imposing a new or increased user fee. The governmental agency shall provide the following notices and utilize the following procedures:

(A) Notice of the date, time, and place of the meeting, including a general explanation of the matter to be considered, shall be mailed at least 14 days prior to the meeting to any interested party who files a written request with the governmental agency for mailed notice of the meeting on new or increased fees or service charges. Any written request for mailed notices shall be valid for one year from the date on which it is filed unless a renewal request is filed prior to the expiration of the one-year period for which the written request was filed. The legislative body



may establish a reasonable annual charge for sending notices based on the estimated cost of providing the service.

(B) At least 10 days prior to the meeting, the governmental agency shall make available to the public data that supports the amount of the fee or the increase in the fee.

(C) (i) At least 10 days prior to the meeting, the governmental agency shall publish a notice in a newspaper of general circulation in that agency's jurisdiction stating the date, time, and place of the meeting, including a general explanation of the matter to be considered.

(ii) Any costs incurred by the governmental agency in conducting the meeting or meetings required by this section may be recovered from fees charged for the services that are the subject of the fee.

(iii) For transportation projects specifically authorized by this chapter, at least 10 days prior to the meeting, the governmental agency shall publish for four consecutive times, a notice in the newspaper of general circulation in the affected area stating in no smaller than 10-point type a notice specifying the subject of the hearing, the date, time, and place of the meeting, and in at least 8-point type a general explanation of the matter to be considered.

(D) No local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount that exceeds the estimated amount required to provide the service for which the fee or service charge is levied and a reasonable rate of return on investment, pursuant to paragraph (4). Any action by a local agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge pursuant to this chapter shall be taken only by ordinance or resolution. The legislative body of a local agency shall not delegate the authority to adopt a new fee or service charge, or to increase a fee or service charge.

(6) Require that if the legislative body of the governmental agency determines that fees or service charges create revenues in excess of the actual cost for which the user fee revenues are dedicated and a reasonable rate of return on investment, pursuant to paragraph (4), those revenues shall either be applied to any indebtedness incurred by the private entity with respect to the project, be paid into a reserve account in order to offset future operation costs, be paid into the appropriate government account, be used to reduce the user fee or service charge creating the excess, or a combination of these sources.

(7) Require the private entity to maintain the facility in good operating condition at all times, including the time the facility reverts to the governmental agency.

(8) Preparation by the private entity of an annual audited report accounting for the income received and expenses to operate the facility. The private entity shall make that report available to any member of the public for a cost not to exceed the cost of reproduction of the report.

(9) Provision for a buyout of the private entity by the governmental entity in the event of termination or default before the end of the lease term.

(10) Provision for appropriate indemnity promises between the governmental agency and the private entity.

(11) Provision requiring the private entity to maintain insurance with those coverages and in those amounts that the governmental agency deems appropriate.

(12) In the event of a dispute between the governmental agency and the private entity, both parties shall be entitled to all available legal or equitable remedies.

5956.7. (a) The governmental agency may exercise any power possessed by it with respect to the development and construction of infrastructure projects pursuant to this chapter. Agreements for the maintenance and police services entered into pursuant to this chapter shall provide for full



reimbursement for services rendered by the governmental agency in accordance with the terms and conditions specified in the agreement. The governmental agency may provide services for which it is reimbursed with respect to preliminary planning, environmental certification, and preliminary design of the infrastructure projects. The governmental agency may consult with legal, financial, and other consultants in the negotiation and development of the agreement. To the extent existing public utility infrastructure is necessarily required to be modified, relocated, or removed in order for an infrastructure project authorized by this chapter to be constructed, the cost of modification, relocation, or removal of the existing infrastructure shall be borne by the private entity and included as a recoverable capital cost of the project. This cost shall not be construed to include costs of increasing the capacity, or upgrading, or improving the existing public utility infrastructure.

(b) The private entity's responsibility to modify, relocate, or remove existing public utility infrastructure shall not alter any agreements that may be in place between the governmental agency and any public utility regarding projects funded by the governmental agency.

(c) In the event of a dispute regarding the reimbursement required, a private entity may request an audit of the public utility's costs by a mutually acceptable certified public accountant. The result of the audit shall determine the actual costs. If the audit indicates that the public utility's actual costs were less than 95 percent of the cost claimed, the cost of the audit shall be borne by the public utility. If the audit indicates that the public utility's actual costs were 95 percent or more of the cost claimed, the cost of the audit shall be borne by the private entity.

5956.8. The plans and specifications for each project constructed pursuant to this chapter shall comply with all applicable governmental design standards for that particular infrastructure project. The private entity designing, constructing, operating, and maintaining infrastructure facilities pursuant to this chapter shall utilize private sector design and construction firms to design and construct the infrastructure facilities. However, a facility subject to this chapter and leased to a private entity shall, during the term of the lease, be deemed to be public property for purposes of identification, maintenance, enforcement of laws and for purposes of Division 3.6 (commencing with Section 810). All public works constructed pursuant to this chapter shall comply with Chapter 1(commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

5956.9. In order to use the authority conferred by this chapter to the maximum extent, a governmental agency may use private infrastructure financing pursuant to this chapter as the exclusive revenue source or as a supplemental revenue source with federal or local funds. The governmental agency involved may be a local governmental agency or a combination of local governmental agencies.

The governmental agency may work cooperatively with the California Infrastructure and Economic Development Board with regard to the design, construction, operation, and financing of privately financed facilities, but the projects will not be subject to the review or approval of that board.

5956.10. Notwithstanding any provision of this chapter, neither the state or any state agency may directly or indirectly use the authority in this chapter, nor may any governmental agency as



defined in Section 5956.3, use the authority in this chapter, to design, construct, finance, or operate a state project. For purposes of this section, a state project includes any of the following:

- (a) Toll roads on state highways.
- (b) State water projects.
- (c) State park and recreation projects.
- (d) State financed projects.

These limitations shall not prohibit the state, any state agency, or any governmental agency as defined in Section 5956.3, from utilizing authorizations contained in other provisions of law.



D.2. Performance Based Infrastructure¹¹

Empowering California to build, operate and maintain infrastructure better, faster and for less. In December (2007), the Governor called on California to pass legislation that will permit the broad use of Performance Based Infrastructure (PBI)-also referred to as public-private partnerships-when this method can boost service for citizens or lower costs for taxpayers.

- **PBI can improve services for citizens and save taxpayer dollars.** The Governor proposes:
 - Expanding the types of projects, services and government entities that can enter into PBI arrangements.
 - Increasing contracting flexibility so the state can better negotiate with potential contractors.
 - Establishing "PBI California," a center for excellence that will help determine which projects can benefit from PBI, provide expertise in negotiations with PBI participants, ensure transparency and monitor performance. PBI California will manage and implement contractual arrangements and will also assemble statewide demand in order to enhance negotiating leverage and improve terms and conditions for taxpayers and citizens. PBI California will contract with governmental entities (local and state) and act as a repository of knowledge, understanding, expertise and practical experience in connection with PBI-related transactions.
- **PBI combines the strengths and values of the public and private sectors.** PBI allows government and private companies to enter into contracts that make both responsible for the delivery of infrastructure services. These partnerships produce results by combining the advantages of the private sector- dynamism, access to finance, knowledge of technologies, management efficiency and entrepreneurial spirit-with the social responsibility, environmental awareness, local knowledge, safety requirements and job generation concerns of the public sector. PBI is not mandatory. It is simply an optional alternative for governments to employ if and when doing so provides value when compared to traditional infrastructure provision.
- **PBI is used widely used around the world, with great success.**
 - The United Kingdom has used PBI in hundreds of cases, including more than 350 schools, hospitals and transportation systems, more than 100 government office buildings, waste treatment facilities, prisons, museums, courts and public recreation projects.
 - In France, PBI has been used for decades, especially in the transportation and public utility sectors. Recent contracts granted include two high speed rail lines out of Paris, four prisons, an inland waterway and waste water treatment plants.
 - Using PBI, Australian states have built schools, prisons, courthouses, convention centers, freeways, freight and commuter rail, power stations, hospitals and health

¹¹ This section includes language from the Administration's Strategic Growth Plan and can be found in full at <http://gov.ca.gov/issue/performance-based-infrastructure>.



- campuses. Australia's national government is now exploring the use of PBI in the national freight and transportation networks and energy and water sectors.
- Ireland has used PBI on over 100 wastewater projects, and the Netherlands leads the world in employing PBI for social housing and urban regeneration.
 - Since 2005, Ontario, Canada has employed PBI for the procurement of 47 major infrastructure projects, including courthouses, youth centers, hospitals and cancer treatment centers.
 - Over the last five years, British Columbia, with a population less than one-eighth the size of California's, has employed PBI for the procurement of nearly \$5 billion in infrastructure financing. Roughly 64 percent of that financing has been privately supplied for projects ranging from mass transit to roads and wastewater treatment facilities.
- **PBI arrangements are newer to the United States, but are being used to achieve efficiencies and savings.** Some recent examples include: the federal government obtaining more than \$25 billion of private financing in connection with a PBI arrangement to provide military housing at Camp Pendleton and other bases, leading to higher tenant satisfaction; the city of Miami recently approving a new \$1 billion tunnel to speed goods movement, reduce congestion and improve the environment at a cost that is 40 percent less than if the government did everything itself; and the state of Missouri seeking PBI bids to rehabilitate or replace 802 bridges.
 - **PBI has the potential to provide approximately \$75 billion to \$100 billion of new infrastructure in California.**
 - Where PBI arrangements are widely enabled and available such as in Europe, Australia and Canada, they account for approximately 15 to 20 percent of new infrastructure. Applied to California's \$500 billion infrastructure needs, this suggests that PBI has the potential to provide approximately \$75 billion to \$100 billion of new infrastructure in California.